

A good portion of this money will be earmarked to the NRDs for meters and additional staff. The remainder will go to DNR for work on the ground water model and other studies, gaging equipment and additional staff needed for data collection and analysis and Compact enforcement.

(Footnotes)

(1) Tri-Basin is not required under the Settlement Agreement to implement a moratorium.

**2003** will be the first year of operation under the settlement. DNR and the NRDS will be gathering detailed information this summer and fall. This information includes number of acres and type of crop irrigated by each surface water permit and ground water well, amount of water pumped, and the type of application system used. Additional data will include the evaporation from reservoirs with a capacity of over 15 acre feet, municipal and industrial uses. Good information will be critical to Nebraska in assuring the accuracy of the ground water model and Compact accounting. Accurate data will allow Nebraska to receive the most water possible under the Compact.

### In 2003:

- DNR will close junior diverters between Harlan County Dam and Guide Rock
- The three states will complete the joint ground water model
- DNR and the NRDs will collect detailed information on water use in Nebraska
- Meters will continue to be installed
- The NRDs will certify irrigated acres
- A joint system improvement study will be initiated

Visit DNR's website for additional information

<http://www.dnr.state.ne.us>



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Nebraska  
Department of Natural Resources  
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## Summary of Republican River Compact Litigation Settlement

On **December 16, 2002** Governor Mike Johanns and Attorney General Don Stenberg announced that Nebraska reached an out-of-court settlement of the U. S. Supreme Court case, Kansas v. Nebraska, Colorado, concerning the Republican River Compact. In May, 2003 the Supreme Court approved the settlement. The Compact, signed in 1943 by the three basin States, allocates the average annual water supply of the Republican River, 11% to the State of Colorado, 49% to Nebraska and 40% to Kansas. Under the Compact, the total allocation given to each State is to be derived from the listed tributaries, and for Nebraska and Kansas, from the mainstem of the Republican River. The settlement does not change the original compact among the states, or the percentages of water supply allocated to each state by the original compact. However, the amount of water allocated to each State varies annually depending on stream flows in nine specifically identified tributaries, all other small tributaries and the mainstem of the Republican River.

Each State is entitled to consume its allocation.

In **May, 1998** the State of Kansas filed complaint with the U. S. Supreme Court alleging that Nebraska violated the Compact "by allowing the proliferation and use of thousands of wells hydraulically connected to the Republican River and its tributaries, by the failure to protect surface

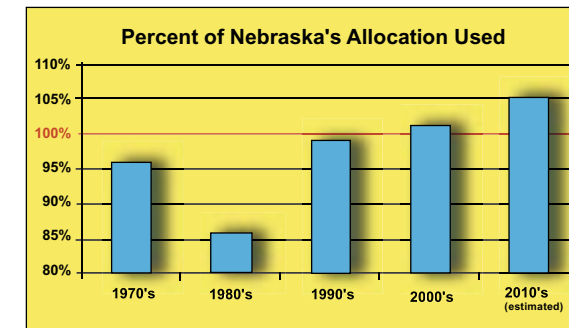
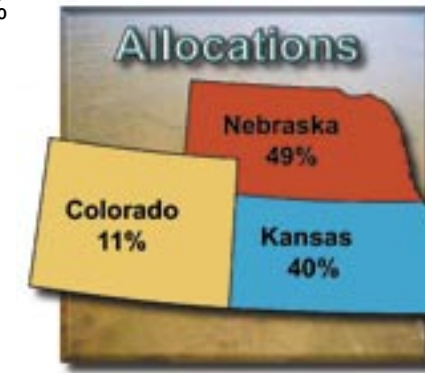


flows from unauthorized appropriation by Nebraska users, and by other acts and omissions."

In **June, 1999** the United States Supreme Court invited Nebraska to file a motion to dismiss the case on the question of whether the Compact restricted the use of ground water. Kansas argued that the Compact restricts all ground water use. Nebraska argued that the Compact only restricts the consumption of water directly diverted from the streams. Colorado stated that the Compact restricts the pumping of alluvial ground water, but not table-land ground water. Alluvial ground water is generally closely connected to streamflow. Pumping from the alluvium causes a relatively immediate depletion to the surface water flows.

On **November 15, 1999** the Court referred the matter to Special Master Vincent L. McKusick. On **January 28, 2000** the Special Master issued his First Report stating that the Republican River Compact restricts a compacting State's consumption of ground water to the extent that such consumption depletes stream flow in the Republican River Basin. McKusick's ruling made it clear that both upland and alluvial wells were to be counted if they deplete streamflow. Among the remaining issues in the case were: 1) Did Nebraska overuse water and if so, was Kansas entitled to any damages resulting from Nebraska's overuse of water; 2) Do the states have the flexibility to use the water allocated from one sub-basin in other parts of the state;

3) Is compliance based on an annual accounting of allocations and use or can it be based on an average over a number of years; 4) What is Kansas's entitlement to water at the Guide Rock diversion dam, which diverts water to the Kansas Bostwick Irrigation District; and 5) Can Nebraska receive credit for water imported into the basin as a result of the Central Nebraska Public Power and Irrigation District's





and Nebraska Public Power District's projects. In **May 2001** Special Master McKusick issued additional rulings, which helped set the stage for a negotiated settlement.

In **October, 2001** the three States began settlement discussions. As a result of these initial discussions, Special Master McKusick postponed parts of the progression of the litigation until **December 15, 2002** to allow time for continued settlement negotiations. The U. S. Department of Justice, U. S. Bureau of Reclamation and the U. S. Army Corps of Engineers also participated in the settlement negotiations. Nebraska's settlement team consisted of David Cookson, Assistant Attorney General, and Roger Patterson, Ann Bleed and Jim Cook from the Department of Natural Resources (DNR). The settlement team was assisted by a number of attorneys and consultants including Nebraskans Don Blankenau from the law firm of Fennemore Craig, Tom Riley from The Flatwater Group consulting firm and Derrel Martin from the University of Nebraska.

The **seventeen months of negotiations**, which took place mostly in Denver or Kansas City, were intense and time consuming, but in the end the states achieved a settlement package that has been described as a win-win-win by all three states.

The Settlement Agreement substantially meets the key objectives Nebraska hoped to achieve at trial while avoiding the uncertainty and expenses that would be involved in protracted litigation. The Settlement Agreement:

- 1. Counts all ground water use that is determined to deplete stream flow as part of a States consumptive use;
- 2. Waives and forever bars all past claims for damages;
- 3. Gives Nebraska the flexibility to use its allocation wherever it sees fit;
- 4. Increases flexibility further by measuring Compact compliance on a five-year running average, as opposed to annually, except in dry years when compliance is measured on a two or three-year running average basis.

Since the 1950s the Compact has been administered by the Republican River Compact Administration, consisting of the State Engineers from Colorado and Kansas and the Director of DNR in Nebraska. The Settlement Agreement continues this administration. The Compact accounting in the past has included the consumptive use of water from surface water and alluvial ground water for irrigation, municipal and industrial uses, as well as the evaporation from the Bureau of Reclamation reservoirs. These calculations will continue, but evaporation from small reservoirs of 15 acre-feet or more and depletions to stream flow caused by all ground water use including from upland wells will now

also be included in the calculations. The Settlement Agreement also provides that **Nebraska will get credit** for any water imported into the basin as a result of surface water projects on the Platte River. The inclusion of stream flow depletions resulting from all groundwater use that depletes streamflow and credits from the Platte River surface water projects requires that the Compact Administration develop a basin-wide ground water model. The three States have agreed to complete a mutually acceptable ground water model to compute depletions to streamflow from ground water

cannot use water allocated from Beaver Creek in another sub-basin.

Also in water short years, when the Bostwick irrigation districts supply is less than 130,000 acre feet to assure Compact compliance Nebraska has agreed to shut off all surface water users between Harlan County Lake and Guide Rock that are junior to February 26, 1948, the priority date of the Nebraska Courtland Canal which also serves the Kansas Bostwick Irrigation District. Nebraska will also protect any storage water released from Harlan

activities in Compact accounting, they agree that it would be useful to know how these activities impact the basin's water supplies. The majority of the costs for this study will be funded by the federal government.

Under the Settlement Agreement, Compact compliance will first be measured in 2007, unless we have a water-short year, in which case compliance will start in 2006. This will give Nebraska time to implement new rules and regulations necessary for Compact compliance. It is important to note that the years counting toward the five-year running average that starts counting in 2007 include 2003.

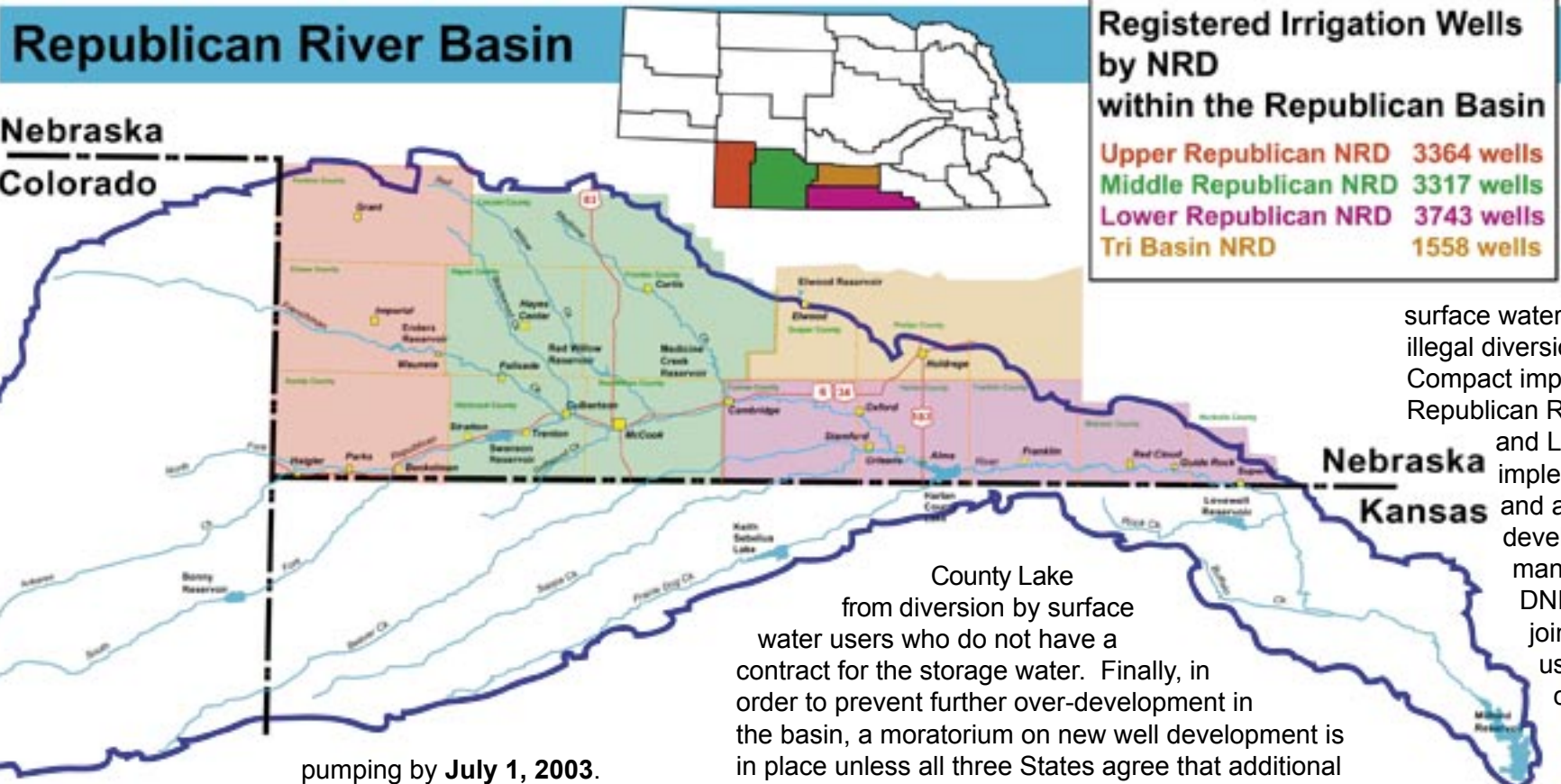
Although the Settlement negotiations were difficult, in many ways the really hard work of implementing the settlement is yet to come. Nebraska, through DNR and the Republican River Basin NRDs, will be responsible for collecting its portion of the necessary data for Compact accounting. DNR will also be responsible for regulating

surface water uses and protecting storage water from illegal diversions. A significant portion of the new Compact implementation responsibilities will fall to the Republican River Basin NRDs. The Upper, Middle, and Lower Republican NRDs have already implemented moratoriums on new wells (1) and are in the process of working with DNR to develop integrated surface and ground water management joint action plans. The NRDs and DNR will have to work closely to coordinate the joint regulation of surface and ground water uses. The NRDs will need to identify and certify the number of acres currently being irrigated by wells. To accurately measure use, all wells need to be metered and the NRDs will make sure the meter data is

accurate. The NRDs will enforce their joint action ground water management plans to insure that ground water users use only the water allowed under the management plan. Finally, the NRDs and DNR will work together to gather the significant amount of

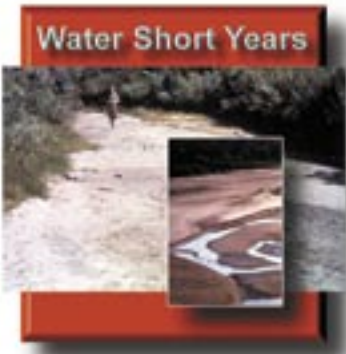
ground water data needed to assure the greatest possible accuracy from the Republican River ground water model.

The implementation of the Settlement Agreement will require Nebraska to fund activities necessary to keep Nebraska in Compact compliance. For this reason, the Legislature has provided additional money to carry out the requirements of the Settlement Agreement.



pumping by **July 1, 2003.**

In water short years, those years in which the water supply for the Kansas and Nebraska Bostwick Irrigation Districts is expected to be less than 119,000 acre feet as projected by the Bureau of Reclamation, Nebraska will limit its consumptive use above the Guide Rock diversion dam to its allocation derived from above Guide Rock on a two or three-year running average basis. In water short years, compliance for Kansas also will be based on a two-year running average. Colorado's compliance is always based on a five-year running average, but in water short years, Colorado



**It is expected that Nebraska should be able to maintain most, if not all, of its existing uses in normal years. In water short years, which occur 25% - 33% of the time, Nebraska will have to reduce consumptive use to stay in compliance with the Compact.**

In addition, the Settlement Agreement includes provisions that lay out a dispute resolution process that the States hope will decrease the need for future litigation. The settlement also provides that the states and the U. S. Bureau of Reclamation will jointly study and, if possible, develop system improvements to make more efficient use of the water that is available in the basin. It also calls for a five year study of the impact of small ponds and terraces on stream flow. While all three States continue to agree not to include the consumptive use from these conservation